

BRIAN D. SHAPIRO

E-filed: April 16, 2013

Trustee in Bankruptcy
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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In Re:

GILBERTT A. SAENZ
ARACELY SAENZ,

Debtor(s).

Chapter 7
Case No. 13-10824-LBR

**TRUSTEE'S OBJECTION TO
EXEMPTION AND MOTION TO
COMPEL TURNOVER OF NON-
EXEMPT ASSETS**

Hearing Date: May 16, 2013
Hearing Time: 11:00 a.m.

BRIAN D. SHAPIRO, Chapter 7 Trustee ("Trustee") in the above-styled Bankruptcy Case, hereby objects to the value of Debtors' exemption in "Checking Account: Regular Checking - 0254" as such exemption is not properly calculated. The Trustee requests this Court to order Gilbertt A. Saenz and Aracely Saenz ("Debtors") to turnover the resulting non-exempt portion of the Checking Account: Regular Checking - 0254. The Trustee additionally requests this Court to order Gilbertt A. Saenz and Aracely Saenz ("Debtors") to turn over the following non-exempt assets: 1) Individual Brokerage with Fidelity, 2) Fidelity IGT Restricted Stock Unit Plan, and 3) 2009 Carson Car Hauler. This Motion is based upon the attached points and authorities, the Declaration in Support and any oral argument that this Court may permit.

DATED this 16 day of April, 2013.


BRIAN D. SHAPIRO, TRUSTEE

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of Facts

1. On January 31, 2013 Debtors filed a Chapter 7 Bankruptcy Proceeding. See generally, Declaration of Brian D. Shapiro in Support.
2. Brian D. Shapiro was appointed to serve as the Chapter 7 Trustee. Id.
3. The §341 meeting of creditors was concluded on March 4, 2013. Id.
4. At the conclusion of the §341 meeting of creditors, the Trustee requested copies of the Debtors date of filing bank statements for their Wells Fargo, and Bank of America accounts. Id.
5. Following the §341 meeting of creditors, Debtors provided the Trustee with the requested date of filing bank statements. Id.
6. On the date of filing, Debtors had a Wells Fargo acct. ending #0254 balance of \$3,850.29. Id. A copy of the redacted bank date of filing bank statement is attached to the Declaration of Brian D. Shapiro in Support as EXHIBIT 1.
7. The Debtors amended their schedules on March 22, 2013 to disclose and exempt “Checking Account: Regular Checking - 0254” with a value of \$3,850.29 and exempt the entire value of the refund utilizing two separate exemptions (Nev. Rev. Stat §21.090(1)(g) and Nev. Rev. Stat. §21.090(1)(z)). Id. A copy of the Debtors amended Schedule C is attached to the Declaration of Brian D. Shapiro in Support as EXHIBIT 2. Id.
8. Pursuant to the Debtors’ amended Schedule C, attached to the Declaration in Support as EXHIBIT 2, the Debtors have claimed \$1,055.71 of the “Financial Account: Individual Brokerage with Fidelity” as exempt pursuant to Nev. Rev.

1 Stat. §21.090(1)(z). Pursuant to a Fidelity statement provided by the Debtors,
2 they owned 193 shares of IGT, and had cash holdings of \$26.47 as of month
3 ending December 31, 2012. On the date of filing, the IGT shares of stock held in
4 “Financial Account: Individual Brokerage with Fidelity” traded at an adjusted
5 close of \$15.30, valuing Debtors portfolio at approximately \$2,979.37. The value
6 of the “Financial Account: Individual Brokerage with Fidelity”, less the Debtors
7 claimed exemption, results in \$1,923.66 due for turnover to the Estate. Id. A
8 copy of the redacted Fidelity account statements and Yahoo! Finance Historical
9 Prices is attached to the Declaration of Brian D. Shapiro in Support as EXHIBIT
10 3.
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13 9. Pursuant to the Fidelity statement provided by the Debtors, and as attached to the
14 Declaration of Brian D. Shapiro in Support as EXHIBIT 3, the Debtors also hold
15 an IGT Stock Option Plan, IGT Stock Purchase Plan, and IGT Restricted Stock
16 Units. The Debtors have failed to disclose, and have further failed to exempt, the
17 IGT Stock Option Plan, IGT Stock Purchase Plan, and IGT Restricted Stock
18 Units. Id.
19

20 10. Pursuant to the Fidelity statement provided by the Debtors, and as attached to the
21 Declaration of Brian D. Shapiro in Support as EXHIBIT 3, the IGT Stock Option
22 Plan, and the IGT Stock Purchase Plan had a \$0.00 value. The IGT Restricted
23 Stock Unit plan had a value of \$7,510.10 as of the month ending December 31,
24 2012, leaving the full balance non-exempt and due for turnover to the Estate. Id.
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26 11. Pursuant to the Debtors’ amended Schedule B, the Debtors are in possession of a
27 2009 Carson Car Hauler with a disclosed value of \$400.00. The Debtors have not
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1 claimed any exemptions towards the 2009 Carson Car Hauler resulting in
 2 \$400.00 of non-exempt equity due for turnover to the Estate. Alternatively, the
 3 2009 Carson Car Hauler is due for turnover to the Estate to be liquidated by the
 4 Trustee. Id.

5 12. The bar date originally set by the Court to file a complaint objecting to Debtor's
 6 discharge is May 3, 2013. Id.

8 **II. Legal Argument**

9 **1. Objection to Exemption in "Checking Account: Regular Checking - 0254"**

10 As set forth above, on the date of filing, Debtors had a Wells Fargo acct. ending #0254
 11 balance of \$3,850.29. The value of the exemption claimed by the Debtors is not calculated
 12 correctly. Accordingly, Debtors should amend Schedules C to reflect the correct value of the
 13 exemption and turnover the non-exempt portion to the Trustee.

14 11 U.S.C. § 522(l) directs debtors to file a claim of exemptions of property they desire to
 15 protect and provides, in pertinent part:

16 The debtor shall file a list of property that the debtor claims as exempt under
 17 subsection (b) of this section... Unless a party in interest objects, the property
 18 claim as exempt on such a list is exempt.

19 Further, Bankruptcy Rule 4003 sets forth procedures for claiming exemptions and objection to
 20 exemptions. It provides, in subsection (b):

21 ... a party in interest may file an objection to the list of property claimed as
 22 exempt within 30 days after the meeting of creditors held upon §341(a) is
 23 concluded or within 30 days after any amendment to the list or supplemental
 24 schedules is filed, whichever is later. The court may, for cause, extend the time
 25 for filing objections if, before the time to object expires, a party in interest files a
 26 request for an extension.

27 In this case, the Debtors amended their Schedule B and C on March 22, 2013. As a
 28 result of the filing of this objection, the objection was timely filed.

1 The party objecting to an exemption claim has the burden of proving that the exemption
 2 is not properly claimed. See *In re Cerchione*, 398 B.R. 699, 703 (Bankr. D. Idaho 2009). A
 3 party objecting to a claim of exemption has the initial burden to prove that the exemption is not
 4 properly claimed. Proof is required to rebut the presumption that the claimed exemption is valid.

5 Once the initial burden is met, the debtor must come forward with evidence to show the
 6 propriety of the claim of exemption. Despite the shifting burden, the ultimate burden of
 7 persuasion stays with the objecting party. See *Carter v. Anderson (In re Carter)*, 182 F.3d 1027,
 8 1029 n.3 (9th Cir 1999). The exemption statutes are to be liberally construed in favor of the
 9 debtor. See *Dudley v. Anderson (In re Dudley)*, 249 F.3d 1170, 1176 (9th Cir. 2001). However,
 10 the language "... may not be 'tortured' in the guise of liberal construction." *In re Wiley*, 352
 11 B.R. 716, 718 (Bankr. D. Idaho 2006).

12 The following property is exempt from execution, except as otherwise specifically
 13 provided in this section or required by federal law. NRS § 21.090(1)(g) states:

14 For any workweek, 75 percent of the disposable earnings of a judgment debtor
 15 during that week, or 50 times the minimum hourly wage prescribed by section
 16 6(a)(1) of the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1),
 17 and in effect at the time the earnings are payable, whichever is greater. Except as
 18 otherwise provided in paragraphs (o), (s) and (t), the exemption provided in this
 19 paragraph does not apply in the case of any order of a court of competent
 20 jurisdiction for the support of any person, any order of a court of bankruptcy or of
 21 any debt due for any state or federal tax.

22 Additionally, the value of the property is determined according to the following standard in
 23 11U.S.C. §522 (a)(2):

24 "value" means fair market value as of the date of the filing of the petition or, with
 25 respect to property that becomes property of the estate after such date, as of the
 26 date such property becomes property of the estate.

27 On the date of filing, the Checking Account: Regular Checking – 0254 had a balance of
 28 \$3,850.29. Pursuant to Nev. Rev Stat. §21.090(1)(g), 75% is \$2,887.72, not \$2,906.00 as

1 currently stated on the Debtors amended Sch. C. The correctly computed exemption, in addition
2 to the wildcard exemption claimed towards the Checking Account: Regular Checking – 0254,
3 results in non-exempt equity due for turnover to the Estate of \$18.28 (i.e. \$3,850.29 - \$2,887.72
4 - \$944.29). The Trustee requests that the Debtors amend their schedules to list the correct value
5 of the Nev. Rev. Stat. §21.090(1)(g) exemption (i.e. \$2,887.72).

6
7 **III. Motion for Turnover of Checking Account: Regular Checking – 0254, Individual**
8 **Brokerage with Fidelity, Fidelity IGT Restricted Stock Unit Plan, and 2009 Carson**
9 **Car Hauler**

10 As set forth above, the Debtor has failed to utilize the correct value of the Nev. Rev.
11 Stat. §21.090(1)(g) exemption as it pertains to the Checking Account: Regular Checking –
12 0254. The Trustee requests the Court to order that the Checking Account: Regular Checking –
13 0254 (\$3,850.29), less the correct value of the Nev. Rev. Stat. §21.090(1)(g) exemption (i.e.
14 \$2,887.72), less the wildcard exemption of \$944.29, be turned over to the Trustee.
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16 The Trustee further requests the Court to order Debtors to turn over the date of filing
17 balance of the “Financial Account: Individual Brokerage with Fidelity” (\$2,979.37), less the
18 exemption claimed of \$1,055.71, to the Trustee.
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20 The Trustee further requests the Court to order Debtors to turn over the date of filing
21 balance of the IGT Restricted Stock Unit plan (approximately \$7,510.10), to the Trustee as the
22 same is a non-disclosed, and non-exempt asset of the Estate.
23

24 Lastly, the Trustee requests the Court to order that the Debtors turn over \$400.00 of non-
25 exempt equity in the 2009 Carson Car Hauler, or alternatively, turnover of the 2009 Carson Car
26 Hauler.
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1 11 U.S.C. §541 compels an entity, in possession, custody or control of the property of
2 the estate to turn the same over to the Trustee upon demand. Likewise, pursuant to 11.U.S.C.
3 §521(c)(3), the Debtor is required to "surrender to the trustee all property of the estate..."

4 **IV. Conclusion**

5 The Trustee respectfully requests, based upon due process, as well as the above
6 referenced statutory law, that the Court deny the value of the exemption as stated herein and to
7 order the immediate turnover of the non-exempt portion of the Checking Account: Regular
8 Checking – 0254, the non-exempt portion of the Individual Brokerage with Fidelity, the full
9 value of Fidelity IGT Restricted Stock Unit Plan, and the non-exempt value of the 2009 Carson
10 Car Hauler, or alternatively, turnover of the 2009 Carson Car Hauler to be liquidated by the
11 Trustee.
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15 DATED this 16 day of April, 2013.

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19 BRIAN D. SHAPIRO, TRUSTEE
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EXHIBIT 1

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6 **BRIAN D. SHAPIRO**
7 Trustee in Bankruptcy
8 228 S. 4th Street, Ste. 300
9 Las Vegas, NV 89101
10 (702) 386-8600 Fax (702) 383-0994
11 trustee@trusteeshapiro.com

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In Re:

GILBERTT A. SAENZ
ARACELY SAENZ,

Debtor(s).

Chapter 7
Case No. 13-10824-LBR

**[PROPOSED] ORDER GRANTING
TRUSTEE'S OBJECTION TO
EXEMPTION AND MOTION TO
COMPEL TURNOVER OF NON-
EXEMPT ASSETS**

Hearing Date: May 16, 2013
Hearing Time: 11:00a.m.

Brian D. Shapiro, Trustee having filed an Objection to Exemption and Motion to Compel Turnover of Non-Exempt Assets ("Objection"). The objection was heard on the above referenced date, before the United States Bankruptcy Court, District of Nevada; Brian D. Shapiro appearing, and no other party having appeared. The Court finding that notice of the motion was proper, having stated its findings of fact and conclusions of law on the record, good cause appearing, therefore, it is hereby:

ORDERED that the Court's findings of facts and conclusions of law as stated on the record are incorporated within this order as if fully stated herein. It is further

1 ORDERED that the Trustee's Objection to Debtors claimed exemption in the Checking
2 Account: Regular Checking – 0254 is granted. It is further

3 ORDERED that within thirty (30) days of the entry of this order, the Debtors shall
4 turnover \$18.28 in non-exempt funds as a result of the Checking Account: Regular Checking –
5 0254 in the form of a certified check or money order, payable to Brian D. Shapiro, Trustee and
6 delivered to 228 S. 4th Street, Ste. 300, Las Vegas, Nevada. It is further
7

8 ORDERED that within thirty (30) days of the entry of this order, the Debtors shall
9 turnover the date of filing balance of the "Financial Account: Individual Brokerage with
10 Fidelity" (\$2,979.37), less the exemption claimed of \$1,055.71, or \$1,923.66 in the form of a
11 certified check or money order, payable to Brian D. Shapiro, Trustee and delivered to 228 S. 4th
12 Street, Ste. 300, Las Vegas, Nevada. It is further
13

14 ORDERED that within thirty (30) days of the entry of this order, the Debtors shall turn
15 over the date of filing balance of the IGT Restricted Stock Unit plan (approximately \$7,510.10)
16 in the form of a certified check or money order, payable to Brian D. Shapiro, Trustee and
17 delivered to 228 S. 4th Street, Ste. 300, Las Vegas, Nevada. It is further
18

19 ORDERED that within thirty (30) days of the entry of this order, the Debtors shall turn
20 over \$400.00 of non-exempt equity in the 2009 Carson Car Hauler in the form of a certified
21 check or money order, payable to Brian D. Shapiro, Trustee and delivered to 228 S. 4th Street,
22 Ste. 300, Las Vegas, Nevada, or alternatively, turnover of the 2009 Carson Car Hauler to be
23 liquidated by the Estate.
24

25 Submitted by:

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BRIAN D. SHAPIRO, TRUSTEE
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ALTERNATIVE METHOD Re: RULE 9021

In accordance with LR 9021, counsel submitting this document certifies as follows:

_____ The court has waived the requirement of approval under LR 9021(b)(1).

_____ No party appeared at the hearing or filed an objection to the motion.

_____ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

 x I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

Brian D. Shapiro

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